

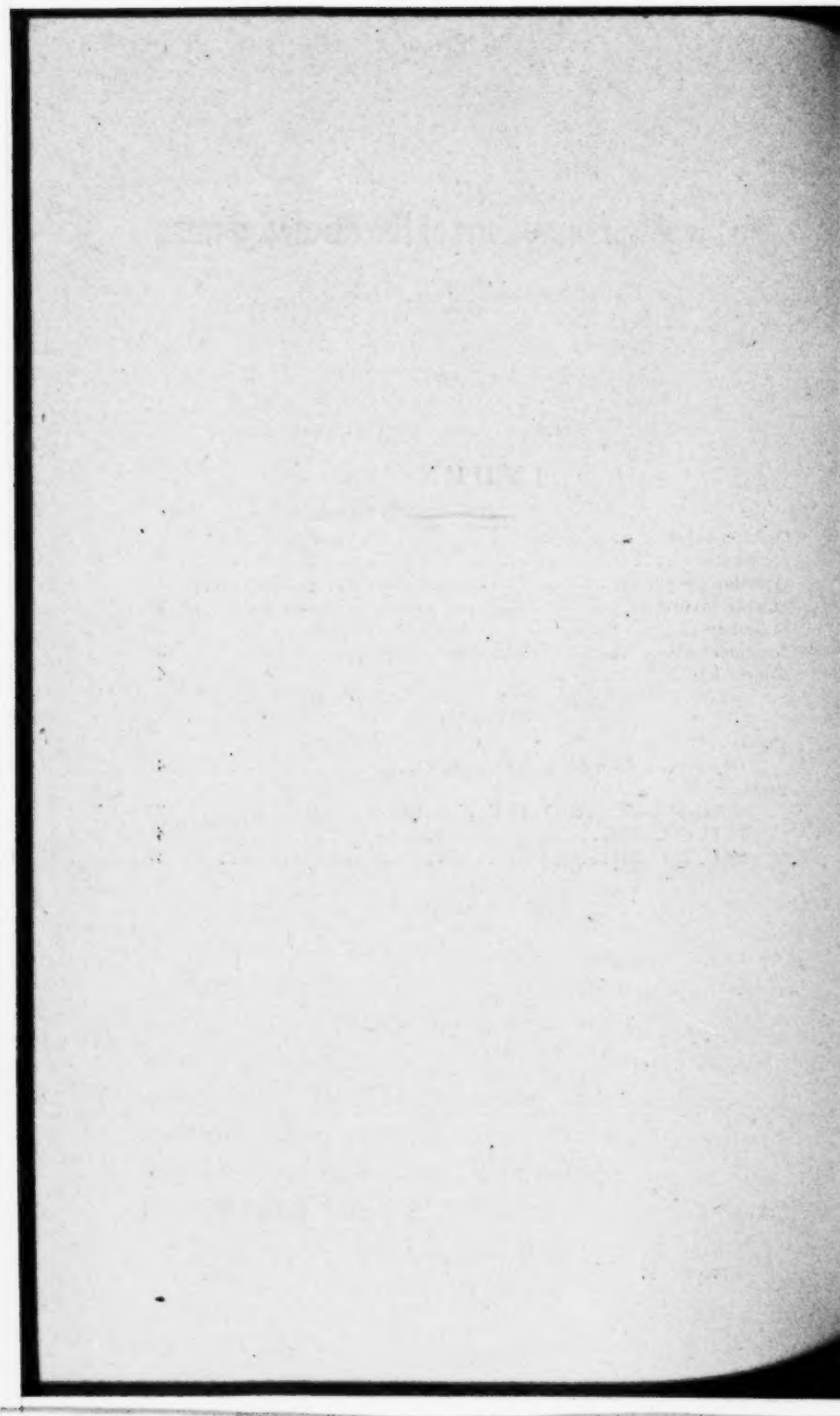
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(1)



In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1247

RICHARD HENRY LEA, JR., PETITIONER

v.

UNITED STATES OF AMERICA

**ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED
STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH
CIRCUIT**

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 22-24) is reported at 159 F. 2d 939.

JURISDICTION

The judgment of the circuit court of appeals was entered February 15, 1947 (R. 25), and a petition for rehearing (R. 26-27) was denied March 17, 1947 (R. 28). The petition for a writ of certiorari was filed April 14, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTION PRESENTED

Whether the indictment charging that petitioner embezzled moneys of the United States is fatally defective for failure to allege that a fiduciary relationship existed between petitioner and the United States.

STATUTE INVOLVED

Section 47 of the Criminal Code (18 U. S. C. 100) provides:

Whoever shall embezzle, steal, or purloin any money, property, record, voucher, or valuable thing whatever, of the moneys, goods, chattels, records, or property of the United States, shall be fined not more than \$5,000, or imprisoned not more than five years, or both.

STATEMENT

On October 12, 1944, an indictment in one count was returned in the District Court for the Eastern District of Louisiana, charging that between December 5, 1942, and July 11, 1944:

* * * Richard Henry Lea, Jr., whose full name is otherwise unknown to your Grand Jurors, hereinafter referred to as "defendant," did unlawfully, feloniously and fraudulently embezzle and convert to his own use certain monies and property of the United States of America, to-wit, the sum of \$18,133.64, a further description of which is unknown to your Grand Jurors, the said sum of \$18,133.64, being the proceeds of sales of certain United States War

Saving Bonds, Series E, made by United Theatres, Incorporated during the period aforesaid, the said United Theatres, Incorporated being then and there duly authorized and qualified to act as issuing agent for the sale of said United States War Saving Bonds, Series E, and the said defendant having then and there come into the lawful possession of said monies as an agent and employee of the said United Theatres, Incorporated; * * * (R. 2).

Petitioner demurred to the indictment (R. 4-6) on the ground, *inter alia*, that it failed to show a fiduciary relationship between him and the United States (R. 4). The demurrer was overruled (R. 7), and thereafter petitioner entered a plea of *nolo contendere* (R. 9-10). He was sentenced to imprisonment for two years (R. 10-11). On appeal, the judgment was affirmed (R. 25).

ARGUMENT

The only question here is whether the indictment is fatally defective for failure to allege the existence of a fiduciary relationship between petitioner and the United States, the owner of the monies obtained from the sale of the war bonds (see Pet. 5-6).

As the court below pointed out (R. 23-24), such a relationship is fairly averred in the series of allegations that petitioner *embezzled* monies of the United States, the proceeds of sales of war savings bonds made by United Theatres, which was a duly authorized issuing agent for the sale

of such bonds, and that petitioner came into the lawful possession of the monies as an employee and agent of United Theatres. These allegations show that as an employee of United Theatres, a corporation which could act only through its officers and agents, petitioner occupied a position of trust in relation to property of the United States which lawfully came into his possession. Thus, the indictment alleges every element of a fiduciary relationship between petitioner and the United States. At worst, there is a mere imperfection in form in the omission specifically to state by way of conclusion from the foregoing that such a relationship existed. Such a defect, which obviously did not affect the substantial rights of petitioner, does not vitiate his conviction on his plea of *nolo contendere*. See 18 U. S. C. 556; 28 U. S. C. 391; *Hagner v. United States*, 285 U. S. 427.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1947.

